IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 841

SUSAN G. REEVES,

Petitioner,

vs.

WILLIAM BEARDALL, as Executor of the Last Will and Testament of Susan J. Graham, Deceased,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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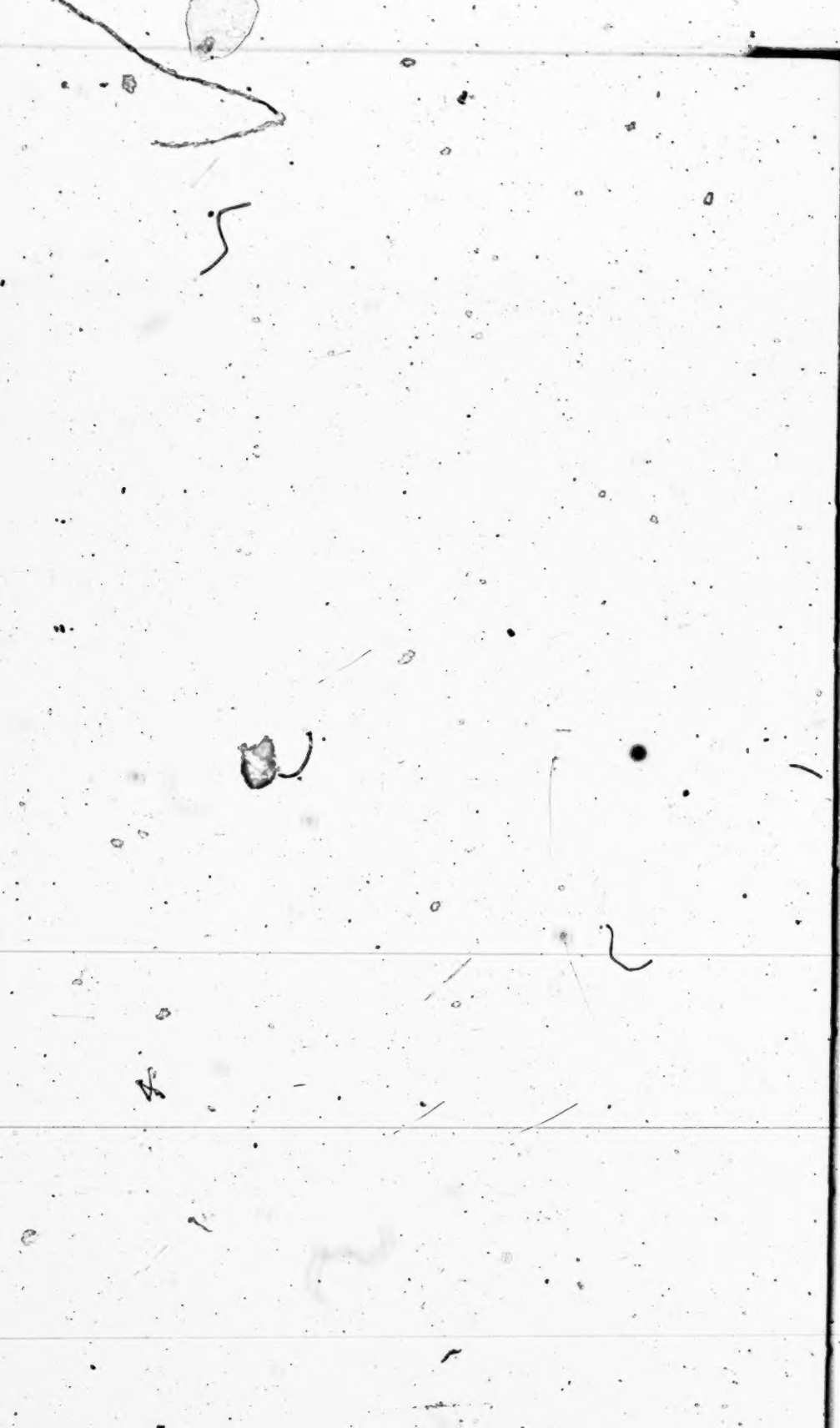

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Opinions Below

No opinion was delivered by the Circuit Court of Appeals other than the statement in the minutes of the Court for October 7, 1941, that the appeal was dismissed on the grounds that the judgment appealed from was not final (R. 55). No opinion was delivered by District Judge Alexander Akerman, who signed the judgment of the United States District Court for the Southern District of Florida, from which the appeal to the Circuit Court of Appeals for the Fifth Circuit was taken and which judgment was in terms designated as a "final judgment" (R. 47-48).

The Jurisdiction of This Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. No question is involved under the Constitution or statutes of the United States and the jurisdiction of the courts below was based solely on diversity of citizenship.

Question Presented

The only question presented to this Court is whether the judgment of the United States District Court for the Southern District of Florida (R. 47-48) dismissing Count II of petitioner's complaint and directing that petitioner "go hence without day" as to said count was a final decision from which an appeal could be taken to the Circuit Court of Appeals.

Statement

The petitioner's amended complaint contains three separate and distinct claims, viz.: Count I, a claim by the petitioner against the respondent Beardall on a promissory note; Count II, a claim by the petitioner against the respondent for specific performance of a promise not to change a will, or in the alternative for damages equal to the net value of the estate; and Count III, a claim by the petitioner against defendant Hamer for an accounting (R. 1-29, 38-39). The two separate and distinct claims against the respondent were joined as independent claims under the provisions of Rule 18(a) of the new Rules of Civil Procedure. The claim against the defendant Hamer was included in the complaint under the provisions of Rule 18(b). Separate transactions are involved and the relief sought in each count is separate and distinct. Respondent filed an answer to Count I and moved to dismiss Count II (R. 43-45). (The answer to Count I was not included in the record before the Circuit Court of Appeals or in the record before this Court.) The motion

to dismiss Count II was granted by an order directing that "final judgment" be entered in favor of the respondent as to this count (R. 46-47), and a judgment designated as a "final judgment" dismissing Count II of the complaint was signed by the District Judge and filed (R. 47-48) under Rule 54(b).

An appeal from the "final judgment" of the District Court was taken to the United States Circuit Court of Appeals for the Fifth Circuit (R. 48-49). When the appeal came on to be heard, the United States Circuit Court of Appeals for the Fifth Circuit dismissed the appeal, without listening to argument on the merits, upon the basis that the appeal was from a judgment that was not final (R. 55). Petitioner filed a petition with the Circuit Court of Appeals for rehearing (R. 55-57), in which the attorney for the respondent joined (R. 57), as he too believed that the judgment appealed from was final and appealable. The petition for a rehearing was denied by the Circuit Court of Appeals without opinion (R. 57). The Writ of Certiorari was granted on February 9, 1942; the respondent having also submitted a brief in support of the petition (R. 57).

Argument

As set forth above in the "Statement", we commence the consideration of the problems of law in this case with a complaint which includes three quite separate and distinct claims, the first two of which are against the respondent and the third against a defendant not a party to the proceedings in the Circuit Court of Appeals and this Court.

Rule 54(b) of the Rules of Civil Procedure reads as follows:

> "Where more than one claim for relief is presented in an action, the court at any stage, upon a determination

> of issues material to a particular claim * * * may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. * * * "

On the face of this language it would appear that this rule would permit the entry of a judgment final in form and substance; for what else can be the meaning of the words "judgment disposing of such claim" as used in the rule? It is respectfully submitted that the District Court followed this rule and entered a final and appealable judgment dismissing Count II of the petitioner's complaint, for this judgment completely disposed of the controversy between the parties as to the alleged contract with regard to the will (R. 47-48). Certainly no judgment could be more final in its terms than was the one entered by the District Court.

As to this question of the finality of the judgment and its proper foundation for an appeal to the Circuit Court of Appeals, the respondent is in complete accord with the petitioner. The respondent joined in the petition for a rehearing by the Circuit Court of Appeals (R. 57, fol. 59), and has already filed a brief with this Court in support of the petition for the Writ of Certiorari. In that brief in referring to the judgment the respondent's counsel stated (p. 3):

> "None of the attorneys can find anything else further to do in regard to Count 2, and the cause of action or claim therein set up."

The position taken by both petitioner and respondent as to the finality of the judgment appealed from has full support in the decisions of several of the Circuit Courts of Appeals. The leading case in this connection would appear to be *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (C. C. A. 2d, 1939).

In the case just cited plaintiff sued the defendant for infringement of copyright and unfair competition arising from defendant's production of the motion picture "Test Pilot". The plaintiff's complaint contained two causes of action or claims: (1) that the motion picture infringed the copyright of his book called "Test Pilot", and (2) that the release of the picture was unfair competition on the ground that the title of the picture would deceive the public into believing that the picture was based on the book with the consent of the plaintiff. The Court granted the defendant's motion to dismiss the first cause of action on the grounds that it did not state facts sufficient to constitute a cause of action. The second cause of action was not then brought to trial and the plaintiff appealed from the judgment dismissing the first cause of action. The Circuit Court of Appeals for the Second Circuit expressly overruled its own earlier decision in *Sheppy* v. *Stevens*, 200 F. 946 (1912), and held that the judgment dismissing the first cause of action was "final" and that the appeal would lie. The Court took the position that with the unlimited joinder of claims between one plaintiff and one defendant authorized by Rule 18, courts must be granted extensive discretionary power to expedite the determination of the issues and avoid delay and inconvenience, and that this was provided for by Rule 54(b) conferring power on the courts to enter separate judgments at various stages. In its opinion (p. 85) the Court states:

> "They (the new Rules) indicate a definite policy to treat a judgment on a separate claim as so far final that it may be enforced by execution. It would clearly be held appealable if capable of immediate enforcement. * * * It seems unlikely that such a judgment whether or not enforceable, is not to be regarded as final for purposes of appeal."

The concurring opinion of Judge Clark in the *Collins* case is most interesting in view of the leading part taken by him in the formulation of the new Rules.

In its opinion in *Collins* v. *Metro-Goldwyn Pictures Corp.*, *supra* (p. 86), the Circuit Court of Appeals for the Second Circuit indicates that the District Judge must use his discretion in granting final judgments from which appeals may be taken so as not to force the Circuit Courts of Appeals to decide issues piecemeal, unless such disposition prevents undue delay. In the case at bar that discretion, it is respectfully submitted, was wisely exercised since the determination by the Circuit Court of Appeals of the validity of the contract not to make a will, set forth in Count II of the complaint, will decide the one big issue which, when decided, will in all probability permit a settlement of all the controversies between the petitioner and the respondent. While the petitioner's claim on the promissory note in Count I involves a separate and distinct transaction and presents distinctly separable legal and factual problems, it is obvious that this claim would become of no importance if the petitioner should be successful as to Count II, under which she claims to be entitled to the entire net estate of her mother because of the latter's contract not to change her former will which was in petitioner's favor.

The Second Circuit is not alone in taking the position that a judgment completely disposing of one of several causes of action is a final judgment from which an appeal to this Court will lie. The Circuit Court of Appeals for the Fourth Circuit, in *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. (2d) 169 (1939), wholeheartedly endorsed the *Collins* case when it said (p. 170):

> "The better opinion seems to be that a judgment finally disposing of one cause of action is appealable although other causes of action are not disposed of. Collins v. Metro-Goldwyn Pictures Corp., 2 Cir., 106 F. 2d 83."

The *Collins* case has also been cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Florian* v. *U. S.*, 114 F. (2d) 990, 993 (1940).

In colloquy with counsel at the time the appeal was dismissed Judge Foster of the Circuit Court of Appeals for the Fifth Circuit referred to the case of *Hunteman* v. *New Orleans Public Service*, 119 F. (2d) 465 (C. C. A. 5th, 1941), decided last spring by that Court. It is respectfully submitted, however, that the Judge was wrong in thinking that that case was in point. Contrary to the case at bar, the *Hunteman* case involved only one cause of action against joint defendants, as is made clear from the language of the Court in its decision, wherein it is stated (p. 466):

> "By seeking a judgment in solido against several defendants charged to be jointly and concurrently negligent, we think appellant presented but one claim for determination between the parties."

In the case at bar there was not one claim between the parties, but two separate and distinct causes of action, each of which might have formed the basis for a separate suit and in each of which the plaintiff sought separate and distinct relief.

There is a distinction between the lack of finality of the kind of judgment appealed from in the *Hunteman* case and the finality of the judgments pursuant to Rule 54(b) appealed from in the *Collins* case and the case at bar. This is noted by Judge Clark in his concurring opinion in the *Collins* case (p. 87), *supra* (p. 5).

The plain language of Rules 18 and 54 of the Rules of Civil Procedure would seem to permit no other construction than that given to them by the *Collins* case, and the other cases cited which approve its doctrine (*supra*, pp. 5, 6). Furthermore, it seems to us that this is the common sense construction to be given to the Rules. If a plaintiff is to be permitted to join in one complaint against one defendant several distinct and unrelated claims, and if the trial court is given the right at any stage to enter a judgment disposing of one or more of such claims leaving the other claims for trial or subsequent disposi-

tion, then justice can best be speeded if such a judgment is considered a final judgment from which an appeal may be taken to a Circuit Court of Appeals. It might well be a matter of months or years before all of the issues in all of the claims joined in one complaint under Rule 18 were determined, and yet under the construction of the Circuit Court of Appeals below the appeal concerning the first matter disposed of by a judgment of a District Court would have to be suspended until such far distant time. Such a delay would not be conducive to an orderly procedure or the reasonably prompt disposition of litigated matters.

It is respectfully submitted that the judgment of the District Court below was a final decision from which an appeal to the Circuit Court of Appeals for the Fifth Circuit would lie and that the order of that Court should be reversed and the case remanded for petitioner's appeal to be heard in that Court on the merits.

Respectfully submitted,

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